RE NIMA TRAVEL SDN. BHD. SUN SOON HENG COACH WORKS SDN. BHD. v. NIMA TRAVEL SDN. BHD.

[O.C.J. (Shankar J.) October 2, 1984]

[Johor Bahru – Companies Winding-Up No. 8 of 1984]

Company Law – Winding up – Petition for – Inability to pay debt – Bona fide dispute – Whether petition should be granted – Costs – Companies Act, 1965, s.218 – Companies (Winding-Up) Rules 1972.

The petitioner brought the petition under section 218 of the Companies Act 1965 to wind up the respondent on the ground that the respondent was unable to pay its debt of $44,180.00 due to the petitioner, being balance of the construction price of a bus body and labour supplied at the request of the respondent. After service of the statutory notice and petition, the respondent gave formal notice of its intention to appear at the hearing to oppose the petition. The respondent by affidavit dated June 16, 1984 disputed the claim as the coach bus had not been built to specifications. Although the debt was disputed, the petitioner asked the Court to proceed to make the winding-up order.

Held, dismissing the petition: (1) a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company;

(2) there is a substantial dispute which should have been apparent to the petitioner at the very least when they received the respondent's affidavit. The continuation of the winding up proceedings after they had that knowledge was not a permissible exercise of the process of the Court. The proper course for the petitioner was to establish its debt by filing an action to have the matter adjudicated upon in the usual way;

(3) order granted to the respondent to tax its costs but payment shall not be enforced until final disposal of the action.

Cases referred to:–

(1) *Re Tweeds Garages Ltd.* [1962] 1 All E.R. 121.
(2) *Re Ban Hong Co. Ltd.* [1959] M.L.J. 100.
(3) *Malayan Plant (Pte.) Ltd.* v. *Moscow Narodny Bank Ltd.* [1978] 2 M.L.J. 81; P.C. [1980] 2 M.L.J. 53.

WINDING-UP PETITION.

Joe Tan for the petitioner.

Miss Cynthia Lim for the respondent.

Cur. Adv. Vult.

Shankar J.: This was a petition brought under section 218 of the Companies Act 1965 by Sun Soon Heng Coach Works Sdn. Bhd. (hereafter referred to as the petitioner) to wind up Nima Travel Sdn. Bhd. (hereafter referred to as the respondent).

The petitioner alleges that the respondent is indebted to the petitioner in the sum of MR$44,180.00 being balance of the construction price of a bus body and labour supplied at the request of the respondent. On February 21, 1984 the petitioner's solicitors served on the respondent a Statutory Notice dated February 18, 1984 and pursuant to section 218 of the Companies Act 1965 at the registered office of the respondent at Kuala Lumpur.

Thereafter the petitioner filed this petition on March 14, 1984 stating that the respondent was unable to pay its debts.

On April 18, 1984 the petitioner's solicitors caused the petition to be served on the respondent. Service was also effected on the other persons required to be served in accordance with law.

On May 26, 1984 the respondent gave formal notice of its intention to appear on June 23, 1984 when the petition was fixed to be heard and to oppose such petition.

On June 18, 1984 an affidavit was filed deposed to by Su Ah Kau a director of the respondent's company. In this affidavit it was averred that the respondent had delivered a coach bus on March 21, 1983 for construction purposes to the petitioner to be built in accordance with certain specifications and requirements. These specifications and requirements were set out in a plan which was annexed to the affidavit as an exhibit. It is averred that the petitioner undertook to build the coach in accordance with these specifications and requirements.

But when the construction of the coach was completed and delivered the respondent discovered that the coach had not been built to specifications and dispute arose between the parties.

A photograph of the completed coach is also exhibited and the respondent's director stated that in spite of the respondent's complaints the petitioner refused to remedy the default.

Although the respondent admits to some financial problems it has been averred that the respondent's company has met all obligations and debts so far and intend to continue to do so. It is further stated that the goodwill and the assets of

the respondent's company are considerably in excess of its liabilities and consequently it is neither just or equitable to wind up the respondent at this juncture.

Finally it is stated that in view of the dispute with the petitioner the present winding up petition is simply a way to enforce payment of a disputed debt and is an abuse of the process of this court.

On June 16, 1984 Syarikat Walker Hill Travel Agency a creditor for $256,569.42 also gave notice of its intention to appear at the hearing and oppose the petition.

The petition was not heard on June 23, 1984 presumably because the registrar's certificate had not been obtained to the effect that the petitioner had complied with the requirements of the Companies (Winding-Up) Rules 1972. This certificate was only obtained on August 29, 1984 and the petition consequently came up for hearing on September 22, 1984.

Submissions were made by counsel for the petitioner and the respondent and various authorities were also cited by the parties.

If I may summarise the arguments which were addressed to me, it would appear that the case for the petitioner was that notwithstanding that the debt was disputed, I should proceed to hear oral evidence from witnesses called by the petitioner to prove that this was a clear case where the respondent was indebted to the petitioner and since the debt had not been settled, I should proceed to make the order of winding-up.

Encik Joe Tan counsel for the petitioner relied very heavily on *Re Tweeds Garages Ltd.*[1] in support of his contention that even if there is a dispute as to the precise amount owed that was not a sufficient answer to the petition if it could be established then the petitioner was a creditor for a sum which would otherwise entitle it to a winding-up order.

Cik Cynthia Lim on the other hand cited in *Re Ban Hong Co. Ltd.*[2] and also referred to the passages appearing in *Buckley* – the Companies Act 1948 (13th edition) at page 451 and 452 in support of her contention that this was a case where there was a *bona fide* dispute between the parties as to whether there was in fact any sum owing from the respondent to the petitioner at all. She further stated that it was the intention of the respondent to bring a cross action against the petitioner for recovery of the damages which the respondent had suffered by reason of the failure of the petitioner to carry out the terms of their contract.

Both parties also referred to *Malayan Plant (Pte.) Ltd.* v. *Moscow Narodny Bank Ltd.*[3] and also on appeal to the Privy Council.

Applying the principles set out in these authorities to the facts before me I hold as follows.

In the course of the argument it transpired that after the statutory demand was made on February 21, 1984 the respondent sent a letter dated February 28, 1984 by hand to the petitioner in which they stated that the debt was disputed and that they would resist any legal proceedings which were brought to enforce this claim.

It must follow from this that when the petition filed this petition on March 14, 1984 they were aware that the debt was disputed. If the respondent's letter did not make the grounds of the dispute sufficiently clear, Mr. Su Ah Kau's affidavit of June 16, 1984 certainly put all the cards on the table. Notwithstanding that the respondent had condescended on further and better particulars of the grounds upon which they were resisting this claim, the petitioner chose to go on with the winding-up.

There is no affidavit on file disputing the contentions in the respondent's affidavit and what the petitioner sought to do instead was to ventilate their claim in open court on the day fixed for the hearing of their winding-up petition.

There is a plethora of authorities to the effect that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company (see *Buckley, supra* at page 451 (a)).

On the facts before me I am satisfied that there is a *bona fide* dispute as to whether there is a debt due from the respondent to the petitioner and also the quantum of such debt. The proper course of action for the plaintiff the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way. If they were so convinced of the strength of their case, they could have applied for summary judgement. These steps could have been taken in February or March 1984

and by now the position may well have crystallised.

Whether or not a winding-up order is made is a discretionary matter. Admittedly the defendant does appear to have some financial problems but this alone is not conclusive. The other major creditor of the respondent is opposed to the winding-up and there is no evidence before me that the defendant is unable to pay the debt of the plaintiff.

The passage in *Buckley* appear to indicate that the old practice was for petitions founded on a disputed debt to be ordered to stand over until the debt was established by action. The modern practice has been to dismiss such petition unless of course the debt is not disputed on some substantial grounds in which case the court could decide on the petition and make the order.

The facts in this case indicate to my mind that there is a substantial dispute here which should have been apparent to the petitioner at the very least when they received the respondent's affidavit dated June 16, 1984.

The continuation of the winding-up proceedings after they had that knowledge, was not a permissible exercise of the process of this court.

Accordingly I would dismiss this petition.

As to costs I order that the respondent may tax their costs but shall not be entitled to enforce payment therefor until the final disposal of the action which the parties may initiate against each other arising out of the debt which was a subject matter of these winding-up proceedings.

Before concluding this judgment there is one other matter that must be mentioned. After hearing arguments from counsel on both sides on September 22, 1984, I intimated that the matter would be adjourned till October 2, 1984 when I would make known my decision in this matter and the reasons therefor. On October 1, 1984 the petitioner's solicitors filed a further affidavit seeking to urge upon me further grounds why it should be held that the respondent is unable to pay his debts. It is trite law that equity aids the diligent. The proper time for parties to file affidavits is before the hearing and not as in this case, after the matter has been adjourned for judgment. Exceptionally, there may be situations where new material has come to light after a trial and before judgment which is highly material to the issue and which no reasonable diligence could have discovered. But this is not such an affidavit. I would accordingly express my disapproval of what has been done here and I would add that I have not taken into consideration any of the matters urged in this latest affidavit in arriving at my decision. Nor do I see the need to do so. The petitioners can safely be left to urge this evidence elsewhere.

Order accordingly.

Solicitors: *Ong Ban Chai & Co.; Lim Cheng Poh & Lim.*

MOKHTAR HAJI JAMALUDIN v. PUSTAKA SISTEM PELAJARAN

[O.C.J. (Gunn Chit Tuan J.) January 22 & 23 & March 13, 1985]

[Kuala Lumpur – Civil Suit No. C775 of 1980]

Copyright – Infringement of – Damages – Award for injury to feelings or pride – Contracts Act, 1950, s.74 – Copyright Act, 1960, s.14(3).

Contract – Breach of oral agreement – Contracts Act, 1950, s.74.

Damages – Copyright infringement – Award for injury to feelings or pride.

The plaintiff was a writer of two literary works entitled "Jalan Yang Berlubang" and "Ukuran Hati Mulia" (hereinafter referred to as the said literary works). The plaintiff sent thirty manuscripts amongst which was the said literary works to the defendants who were a firm of book publishers. There was an oral agreement with the defendants' editor called Encik Alias sometime in 1977 or early 1978 whereby in consideration of advance royalties of $300 and an annual payment of royalty of 10% of the retail sale price of each copy of the said literary works sold, the defendants were given a licence to publish and sell by way of trade to the public the said literary works. There was to have been a written agreement but no such written agreement was made as the plaintiff was told by the defendants that "it would be signed later." However, in early 1980 the plaintiff discovered that the words "oleh Mokhtar A.K." were printed on the cover of the said literary works. As Mokhtar A.K. is another writer, the plaintiff complained that the intention of the defendants was to convey the idea that the said literary works were written by Mokhtar A.K.

On the reverse side of the title page each of the said literary works, the name of the defendants was printed immediately after a letter "C" within a circle which indi-